No. 11222.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA CONSTRUCTORA BECHTEL-McCONE, S. A., a corporation,

Appellant,

vs.

DOYLE McDONALD,

Appellee.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX.

CASES. PAGE

STATUTES.

TEXTBOOKS.

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Appellee's arguments will be answered in the order in which they appear in Appellee's Brief.

I.

Appellee Breached the Employment Contract.

On page 2 of his Brief, Appellee asserts that he had

> "demonstrated the fact that turnbuckles were an inefficient and unsuccessful tool to utilize in the task being performed and that all parties here involved had reverted to the use of key plates for the performance of the construction work at hand."

Further, Appellee asserts that at the time of the alteration between Appellee and Tam (his foreman), Appellee had completed the work assigned to him.

The Appellee thereby argues that he, Appellee, fully performed his employment contract. This argument is restated by Appellee on page 4 of his Brief where he contends that:

> "In view of the total absence of evidence that the Appellee failed to substantially comply with the directions of his employer, there is no proper basis upon which the Appellant's contention of error can be founded."

(a) The Trial Court Expressly Found That Appellee Breached the Contract.

On the contrary, the trial court expressly found:

(1) That it was Appellee's duty to obey the instructions of Foreman Tam with reference to getting the turnbuckles;

(2) That Appellee made no real effort to obey these instructions and did not intend to obey them;

(3) That it was within Tam's rights to give the order to proceed with construction; and

(4) That Appellee's disobedience of this order was equivalent to insubordination. [Tr. pp. 266-267.]

(b) The Court's Finding of Appellee's Breach of Contract Is Fully Supported by the Evidence.

The express findings of the trial court that Appellee wilfully refused to obey the lawful orders and instructions of his foreman, Tam, to use turnbuckles in assembling the bubble-tower sections on the day in question, obtains overwhelming support in the evidence. Appellee's own testimony supports no other conclusion. The testimony of Tam is unequivocal on this issue. [Tr. pp. 71,

81, 128-129, 132.] And Appellee admits the breach at page 3 of his Brief by admitting that he refused to use turnbuckles.

The Appellee's argument about what was the most "efficient" and "successful" tool to utilize in the task of assembling the bubble-tower sections, is wholly beside the point. This is undeniably true because the trial court expressly found it to be immaterial. The trial court found that:

> "It was Mr. McDonald's duty, whether he was so inclined or not, and whether the order that Tam gave him was consistent with the most expeditious and efficient manner of construction, it was still his duty, I find, to obey the order in reference to getting these turnbuckles." [Tr. p. 266.]

(c) The Authorities Cited by Appellee Do Not Support His Argument on the Question of Breach of Contract.

Appellee cites (Brief, p. 4) California Labor Code, Section 2856 which establishes the duty of an employee as that of substantial compliance with all directions of his employer except where such obedience is impossible or unlawful or would impose new and unreasonable burdens on the employee.

This section can afford Appellee no comfort since there was absolutely no compliance, either substantially or otherwise, on the part of Appellee with respect to Tam's order to obtain and use the turnbuckles. Furthermore, Appellee's next statement that there must be "a wilful act or wilful misconduct" by the employee to constitute a refusal to perform (Brief, p. 4) necessarily demonstrates the reversible error latent in this judgment. This,

because the trial court expressly found the refusal of Appellee to be "wilful":

> "He made no real effort to do that, and he *didn't intend* to do it . . ." [Tr. p. 266.]

Appellee next cites the case of *Goudal v. C. B. DeMille Picture Corp.*, 118 Cal. App. 407, 5 P. (2d) 432. This was an action by a motion picture actress in which recovery of damages was obtained for an unjustified discharge of the actress from her employment under a written contract. Defendant employer sought to justify the discharge on the ground of disobedience of orders by the plaintiff employee, but the trial court expressly found and on appeal the finding was upheld that in no instance did the employee fail to obey any final order of the employer. The opinion of the District Court of Appeal makes reference to the fact that the employee on several occasions proposed better methods and insisted upon the use of better methods in accomplishing the work assigned to her, but the court also found that on each separate occasion the employer agreed to follow the suggestions. The District Court of Appeal used certain language in its opinion indicating that in its view the presentation of better methods and insistence by the employee upon the use of better methods even though persistently presented do not amount to wilful disobedience or failure to perform services under the contract, but are, rather, consistent with the contract which basically calls for services in the best interest of the employer. But these statements are not the law of this State as evidenced

by the language of the Supreme Court when, in denying a petition for hearing after decision of the District Court of Appeal, in the *Goudal* case, the Supreme Court said (pp. 415-416):

> "The petition for a hearing is denied. A perusal of the evidence discloses that in no instance was any final order of the employer disobeyed by the plaintiff and it cannot therefore be said that the conclusion of the District Court of Appeal that the findings are supported by the evidence is erroneous. *It should be stated, however, that we do not wish to be understood as approving any declaration in the opinion unnecessary to or inconsistent with this one ground of affirmance of the judgment.*"

Furthermore, the case at bar is clearly distinguishable from *Goudal v. C. B. DeMille Pictures Corporation,* in that in the case at bar there was an admitted refusal on the part of appellee to obey a final order of Foreman Tam and the trial court was expressly so found.

The case of *Greene v. Hawaiian Dredging Co.,* 26 Cal. (2d) 245, 157 P. (2d) 367, cited by Appellee has no bearing upon the case at bar. That case again did not involve the disobedience of an employee but simply involved the peaceful and orderly presentation of protests regarding working conditions by employees. In the case at bar Appellee did not merely protest regarding the instructions of Foreman Tam. He deliberately disobeyed said instructions and the court squarely so found.

II.

Appellee's Breach of the Employment Contract Was Not Waived or Condoned by Appellant.

Appellee's argument on the subject of waiver under Point I of his brief (Brief pp. 5-6) proceeds upon the premise that Appellee was actually discharged from his employment under the written contract here involved. Contrary to this premise Appellant has argued under Points II and IV of Appellant's Opening Brief that Appellee was not discharged. Appellant believes that the argument there presented sufficiently supports the contentions made. Assuming, however, that Appellee was discharged, Appellant has argued under Point V of its Opening Brief, in the alternative, that there was sufficient cause for such discharge.

(a) There Can Be No Waiver Without Knowledge of the Facts.

All authorities cited by Appellee on pages 5 and 6 of his Brief expressly recognize that waiver is a matter of intention and that there can be no intent to waive a breach of contract in the absence of knowledge of the facts constituting the breach.

Appellant believes that the argument set forth under Point V of its Opening Brief sufficiently demonstrates that the alleged waiver found by the court was not based on any knowledge by Appellant of the true facts.

The trial court's finding of waiver was as follows:

> "I must find that on the evening of July 9th, following the altercation between the plaintiff and Tam, the matter came to the attention of Vessels, and Vessels' superior, Mr. McAuliffe, and they did not elect to find that there was insubordination. They might

have done so, and then this court would be confronted with an entirely different problem. But they elected, on the contrary, to overlook what had occurred, and directed the plaintiff to report back for work the next day." [Tr. p. 268.]

Obviously, at this point neither McAuliffe nor Vessels were fully acquainted with the facts for they had not heard Tam's version of the dispute. The record is without contradiction that, at this point, McAuliffe and Vessels merely instructed Appellee to return to work on the following day *pending* their investigation of the facts in order that they might make an intelligent decision in response to Appellee's request that he be transferred to another job. Appellee points to the testimony of McAuliffe in which the latter, after testifying that he made an investigation concerning Appellee's request for a transfer [Tr. pp. 216-217], stated that he did not see any reason why Appellee should be transferred and likewise did not see any reason why he should be discharged and Appellee states that "it is upon the above facts and law that the appellee respectfully submits that the breach, if any, of appellee was waived by the appellant." This, of course, is an entirely different ground of waiver than that relied upon by the trial court as evidenced by the court's finding above quoted. But Appellee's purported ground of waiver is likewise without support.

McAuliffe did not merely refuse to transfer appellee but actually issued instructions for appellee to return to work as usual. [Tr. p. 194.] Appellee refused this instruction just as arbitrarily as he had refused Tam's instructions the day before. Appellee's breach, therefore, was of a continuing nature and thus McAuliffe's instructions could not amount to a waiver.

The principle is well stated in the case of *Gray v. Shepard* (N. Y.) 41 N. E. 500 at 501-502:

> "The claim that the defendant, by retaining the plaintiff in his employment after knowledge of violations of duty, thereby condoned these offenses, and that they could not thereafter be used as grounds for discharge, is without force, in view of the fact that his violations were committed from time to time, continuing until the discharge. The master may overlook breaches of duty in the servant, hoping for reformation; but if he is disappointed, and the servant continues his course of unfaithfulness, he may act in view of his whole course of conduct, in determining whether the contract of employment should be terminated."

And in *Gordon v. Dickinson* (W. Va.), 130 S. E. 650 the court said (p. 652):

> "The proposition relied on by counsel for plaintiff, on the question of waiver and condonation, is that where an employer has knowledge of the misconduct and negligence of his employee and without complaint continues him in his service, such misconduct or omission of duty cannot be made the sole ground for his discharge. But conceding the general rule, defendant's counsel reply that, if there be a repetition of such negligent acts and misconduct, the employer has the right to take into consideration the whole course of conduct of his employee as grounds for his discharge. This proposition seems well founded in reason and authority. In 18 R. C. L. p. 517, §27, the exception to the general rule contended for by plaintiff's counsel is stated thus:
>
> " 'This rule, however, is subject to the qualification that a master has a reasonable time, after ascer-

taining that the servant has broken his contract, in which to discharge him—in other words, waiting a reasonable time before acting will not amount to a waiver of his right. Again, if there has been a repetion of offenses the employer has a right to take the entire record into account.'"

and, again, at page 653, the court said:

"And the law is well settled that the condonation of prior breaches of a contract is always with the implied condition of future good conduct in compliance with the terms of contract."

(b) The Authorities Cited by Appellee in Support of His Argument of Waiver Are Not in Point.

Appellee cites (Brief p. 5) Restatement of Contracts, Sections 309 and 310. These sections specifically recognize that waiver must be accompanied by knowledge of the facts or, if such knowledge is absent, that the party having the right must unreasonably mislead the other.

But in this case it cannot be said either that McAuliffe had knowledge of the facts when he first told Appellee to report back for work the next morning or that there was any misleading of Appellee since Appellee was at no time willing to return to work under the supervision of Tam.

Appellee cites (Brief p. 5) *Page v. Washington Mutual Life Ins. Assn.*, 20 Cal. (2d) 234, 125 P. (2d) 20, and *Spiegelman v. Metropolitan Life Ins. Co.*, 21 Cal. (2d) 299, 68 P. (2d) 1006. These are both cases involving waiver of payment of insurance premiums within the

grace period. In each case the defendant insurance company unconditionally accepted the late payment of premiums and the cases are, therefore, not in point here. Appellee was not willing to and did not render any further performance and there was nothing for appellant to accept.

Appellee refers (Brief p. 6) to the case of *Goold v. Singh,* 88 Cal. App. 339, 263 Pac. 548, as a "leading case." In fact the case has been cited twice in its history and on neither occasion was it cited in support of the point relied upon by Appellee. Furthermore, Appellee has apparently inadvertently stated his conception of the holding in that case in the form of a quotation from the opinion, whereas in fact the matter included within Appellee's quotation marks will actually not be found in the opinion in those words. A correct quotation from *Goold v. Singh* on the point here involved is as follows (88 Cal. App. at 343):

> "The right to declare a forfeiture for the breach of a condition may be waived; and a waiver may be implied from the acts of the vendor after a breach by which the continued validity of the contract is recognized (*Boone v. Templeman,* 158 Cal. 290 [139 Am. St. Rep. 126, 110 Pac. 947]; *Stevinson v. Joy,* 164 Cal. 279 [128 Pac. 751]; *Hermosa Beach etc. Co. v. Law Credit Co.,* 175 Cal. 493 [166 Pac. 22]). A waiver, however, being the intentional relinquishment of a known right after knowledge of the facts (*Wienke v. Rich,* 179 Cal. 220 [176 Pac. 42]), the acts alleged to have had that effect must have been done with full knowledge of the right to declare a forfeiture (*German-American etc. Bank v. Gollmer,*

155 Cal. 683 [24 L. R. A. (N. S.) 1066, 102 Pac. 932]; *Goodwin v. Grosse,* 56 Cal. App. 615 [206 Pac. 138]), and whether there has been a waiver is a question of fact to be determined by the trial court (*Kerr v. Reed,* 187 Cal. 409 [202 Pac. 142]; *California etc. Hotel Co. v. Callender,* 94 Cal. 120, 126 [28 Am. St. Rep. 99, 29 Pac. 859]), unless but one inference can reasonably be drawn from the evidence (*Lompoc Produce etc. Co. v. Browne,* 41 Cal. App. 607 [183 Pac. 166])."

Frank v. New Amsterdam Casualty Co., 175 Cal. 293, 165 Pac. 927, and *Silverberg v. Phoenix Ins. Co.,* 67 Cal. 36, 7 Pac. 38, cited by Appellee (Brief p. 6), likewise do not support Appellee. In the former case the defendant surety company had taken over the defense of a lawsuit for plaintiff and, after having lost the case, and having failed to take an appeal as it had agreed to do, attempted to escape liability for a loss under a technical provision in the surety contract. The finding of waiver was obviously supported by both the knowledge of defendant and the justifiable reliance placed in defendant by plaintiff but neither fact exists in this case. In the *Silverberg* case defendant insurance company had examined all witnesses and vouchers produced by insured and stated that a fire loss would be paid after the expiration of a 60-day period provided in the contract. Defendant permitted the full 60-day period to expire and then attempted to declare the contract forfeited on the basis of a technical provision therein. Again the evidence of knowledge was clear and convincing, a fact which does not exist in this case.

III.

There Is No Support in the Record for the Finding That Appellant Made It Impossible for Appellee to Perform.

Under Point II of his Brief (at page 7), Appellee cites a number of authorities in support of the proposition that where one party to a bilateral contract prevents performance by the other party or makes such performance impossible the former thereby commits a breach of contract and the latter's duty of performance is excused. Appellant does not challenge the correctness of this proposition as a general principle of law but does insist that neither the principle nor any of the authorities cited in support of it has any application to the facts of this case.

The finding of the trial court was that Tam created an impossible condition and that Appellant made it impossible for Appellee to perform further by insisting that Appellee return to work under Tam. Appellee's argument under Point II of his Brief boils down to the proposition that although he was ready, able and willing to complete his contract, *if assigned to work under another foreman,* Appellant arbitrarily refused to give him such assignment despite Appellant's wide range of choice in the matter.

It is respectfully submitted that the court's finding and Appellant's argument do not even attempt to meet the real issues involved, *i. e.,* the question of what the alleged impossibility or prevention of performance consisted of, or the question of who created it if it did exist.

(a) Further Performance by Appellee Was Not Prevented or Made Impossible.

The court placed its finding of impossibility on the ground of bitterness engendered between Appellee and Tam because of the altercation of July 9th. [Tr. p. 269.] Appellant respectfully submits that the lack of any foundation for this finding was clearly demonstrated under Point II(a) of Appellant's Opening Brief. There was no physical impossibility involved in this situation and the only thing required of Appellee was that he return to work under Tam's supervision and recognize the latter's authority as he had agreed to do under his contract of employment. Appellee does not attempt to show that there was anything to prevent Appellee from doing this and there is absolutely nothing in the record to show that it was impossible.

In his argument Appellee is content to assume that it was impossible for him to return to work under the supervision of Tam and that he was therefore entitled to a new assignment.

This assumption must find some support in the record or its invalidity must be conceded. With two exceptions all citations to the record furnished by Appellee under Point II of his Brief are aimed at proving that Appellee requested a transfer to another foreman and was willing to continue in the employment only on that condition, and that his request for a transfer was refused. But there is no issue as to these facts as evidenced by the argument under Point IV of Appellant's Opening Brief and these references are therefore not material. In one of these two exceptions, Appellee refers to the record to show that there were other boilermaker foremen besides Tam on the Bahrein Project. But again there is no issue involved

for the fact just mentioned was set forth in Appellant's statement of the case at page 3 of its Opening Brief. The only attempt by Appellee to support his gratuitous assumption of impossibility and his alleged right to be transferred is the quotation (Brief, p. 8) of a clause of the employment contract which, in unmistakable language, gave Appellant the right to decide where Appellee should work and imposed upon Appellee the duty of abiding by that decision. From this clause, and by a process of patently specious reasoning, Appellee attempts to torture his duty to abide by Appellant's decision into a right to demand a new assignment, and to convert Appellant's right of decision into a duty to comply with Appellee's demand. Reduced to its essence then, Appellee's argument is that performance by him was prevented or rendered impossible simply because his employer refused to let him usurp the employer's exclusive right. This argument is so clearly wrong that it does not call for further answer.

(b) Even Assuming That an Impossibility Existed It Was Not Created by Appellant.

Appellant certainly does not concede that it was impossible for Appellee to have returned to work under the supervision of Tam as he was instructed to do, but earnestly contends that the contrary is demonstrated under Point II(a) of Appellant's Opening Brief. But even if it is assumed that it was impossible for Appellee to return to work under Tam there remains for decision the question of who created the impossibility. Appellee does not attempt to meet this issue anywhere in his brief. And

neither did the court attempt to meet it in making its findings for, in reference to the altercation between Appellee and Tam, the court expressly said [Tr. p. 269]:

> "There is no necessity for me to determine who was the man to blame."

Obviously the impossibility, if any, resulted solely from the altercation following Appellee's deliberate refusal to obey Tam and it was either originally created by Appellee or by Tam. The trial court at one point found that there was no necessity for the court to determine who was the man to blame for the altercation and at another point found that the impossibility was originally created by Tam. Appellant earnestly believes that the argument under Point I of Appellant's Opening Brief demonstrates that this finding of the trial court is wholly without support in the record and is inconsistent with the prior findings that Appellee deliberately disobeyed Tam's instructions and that such disobedience was equivalent to insubordination. Appellant earnestly contends that the trial court's findings and Appellee's argument merely assume that Appellee was entirely innocent in the matter and that Tam alone was at fault. But there is nothing in the record in support of the court's findings or Appellee's position on this point.

(c) The Authorities Cited Under Appellee's Point II Do Not Support His Position.

At page 7 of his Brief, Appellee partially quotes the opening clause of Restatement of Contracts, Section 315, to the effect that where one party to a contract prevents

performance by the other the former thereby breaches the contract. But Appellee omits the next clause in the sentence which reads *"unless* (a) the prevention or hindrance *is caused or justified by the conduct of the other party."* This rule is not concerned with the question of the existence or nonexistence of prevention but merely with the effect of prevention and it recognizes that where, as here, the prevention, if any, is caused or justified by the conduct of a party he cannot be heard to complain about it.

Potts v. Village of Haverstraw, 79 F. (2d) 102, cited by Appellee (Brief, p. 7), was an action by an engineer against the village to recover for breach of an alleged contract whereby the engineer was purportedly employed to design and supervise the construction of a waterworks system. In the course of its opinion the court assumed, *arguendo,* that if there was a contract between the parties, defendants impliedly promised not to prevent performance by plaintiff but held that in fact there was no such contract.

Steel Tank and Pipe Co. v. Pac. Fire Extinguisher Company, 69 Cal. App. 225, 230 Pac. 978 (Appellee's Brief, p. 7), holds that one, who had agreed to sell and deliver a certain steel tank, was not, in the absence of an agreement to that effect, bound to submit to defendant's demand that a union crew be employed to effect the delivery. And Appellee cites this case in support of his contention that Appellant was bound to submit to his demand for a new assignment. The case is squarely against Appellee.

Connell v. Higgins, 170 Cal. 541, 150 Pac. 769 (Appellee's Brief, p. 7), was an action to recover damages for an alleged breach of a building contract by the owner. On appeal plaintiff claimed that he had substantially performed and that full performance was prevented by defendant. But the trial court's judgment in favor of plaintiff was reversed on appeal the court holding that the pleadings did not present any issue as to prevention of performance and that there was no proof of substantial performance.

Rousseau v. Cohn, 20 Cal. App. 469, 129 Pac. 618, cited by Appellee (Brief, p. 7), was a case where the court, without specifically stating the facts on the question of prevention, merely held that there was evidence in the record sustaining the view that defendant owner, without good reason, refused to permit plaintiffs, who were architects, to complete their contract. The case furnishes no support for Appellee's assumption that he was prevented from performing.

Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979, cited by Appellee (Brief, p. 7), was a case where defendant agreed to furnish all fuel, water, casing and tubing to enable plaintiff to drill certain oil wells. Defendant failed to furnish these articles and it was held that plaintiff was thereby prevented from performing. But there is no claim here that Appellant herein failed to furnish Appellee with the equipment necessary to accomplish his

work. On the contrary the entire dispute arose because Appellee deliberately refused to use the turnbuckles which were provided for him and which he was instructed to use.

Carlson v. Sheehan, 157 Cal. 692, 109 Pac. 29, cited by Appellee (Brief, p. 8), holds that where the owner of a building did not prevent or do anything excusing a contractor from completing performance of a building contract, the latter was not justified in refusing to complete the work merely because it became more difficult by reason of landslides from adjoining lots. The case squarely supports Appellant herein.

In *Alderson v. Houston,* 154 Cal. 1, 96 Pac. 884 (Appellee's Brief, p. 9), plaintiffs were employed as brokers to sell certain lots owned by defendant but were prevented from effecting sales solely because of defendants' refusal to perform his agreement to clear the title to the lots. The case has no application to the facts involved herein.

In *Crawford v. Pioneer Box & Lumber Co.,* 105 Cal. App. 760, 288 Pac. 694 (Appellee's Brief, p. 9), plaintiff recovered damages for breach of contract, the breach consisting of defendant's refusal of access to the land upon which certain timber was to be cut. The case has no application to the facts herein.

Appellee cites (Brief, p. 9) 12 American Jurisprudence, Sections 386 and 401. These sections very plainly deal with the *effect* of prevention, which is not in issue here. They do not touch upon the question of the existence or nonexistence of prevention which is the real issue.

Restatement of Contracts, Section 312, cited by Appellee (Brief, p. 9), states, in part:

> "A breach of contract is a non-performance of any contractual duty of immediate performance."

But Appellee admittedly refused to perform in accordance with Tam's orders and he admittedly refused to report back for work as instructed. Therefore, Appellee breached the contract.

The opinion of the District Court of Appeal in *Lockheed Aircraft Corporation v. Superior Court,* 67 A. C. A. 205, 153 P. (2d) 966 (hearing granted by Supreme Court), cited by Appellee (Brief, p. 9) holds in part that the statute forbidding employers from preventing employees from engaging in politics is constitutional and that an employee injured by violation of the statute has a right to recover damages therefor in a civil suit. The case does not have the remotest bearing on the issues in this case.

IV.

No Argument Over Measure of Damages.

Appellee's Point III dealing with the measure of damages as applied by the trial court in this case is entirely immaterial. In the court below, Appellee attempted to recover damages in the sum of $4,015. [Tr. p. 4.] But in accordance with the express language of the contract, the court limited damages to the sum of $852.92 plus costs. [Tr. p. 32.] Appellant does not contend on appeal that the trial court awarded an incorrect amount of damages but rather that the trial court erred in awarding any damages at all.

V.

Conflict in Trial Court's Findings.

Under Point IV of his Brief, Appellee cites authority in support of the general rule that where there is any substantial evidence in support of the trial court's findings of fact such findings will not be disturbed upon appeal. The corollary of this rule, of course, is that where there is no support in the evidence for such findings, they must be held to be erroneous.

Appellant earnestly insists that here the trial court committed error by expressly finding that Appellee was a "wilful contract breaker," which finding is fully supported by the evidence; and then making the further finding, without any support in the evidence whatever, that Appellant waived the breach on Appellee's part by ordering him to return to work under Tam, thereby making it impossible for Appellee further to perform his contract. A finding without any support in the record and in conflict with other findings must be set aside. *Felton v. Le Breton,* 92 Cal. 457, 28 Pac. 490.

Conclusion.

For all of the reasons advanced in Appellant's Opening Brief and in this Reply Brief, it is, therefore, respectfully submitted that the judgment of the trial court should be reversed with instructions to enter judgment for Appellant.

Respectfully submitted,

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